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No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., *Petitioners*,

vs.

BRASHEAR FREIGHT LINES, INC., et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

Attorneys for Petitioners:
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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 99) is reported in 114 F. (2d) 1. The decree of the District Court, paragraph 4 of which, as modified, constitutes the basis of the appeal to the Circuit Court, appears in the record only (R. 67). The opinion of the District Court, 23 Fed. Supp. 865, deals solely with the injunction matter. It is, therefore, of indirect interest only.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on August 26, 1940 (R. 105). The petition for a writ of certiorari was filed on November 4, 1940, and was granted on December 16, 1940 (R. 107). The jurisdiction of this Court rests upon Section 240 of the Judicial Code, as amended, (28 USCA 347).

THE QUESTIONS PRESENTED.

This proceeding presents the following questions, namely:

I.

Are petitioners (defendants below), or any of them, proper parties to maintain an ancillary action against plaintiffs and the sureties on their two injunction bonds for a money judgment, on behalf of the State of Missouri, for statutory, road-use license fees, collection of which was restrained for fifteen (15) months, and deposit of which with the trustee, in accordance with the terms of the temporary restraining order, throughout said time was refused by plaintiffs?

II.

If so, did the specially constituted three-judge District Court abuse its discretion by overruling defendants' Motion For Damages against plaintiffs and the surety on their two injunction bonds, (considering the condition of the temporary restraining order and the wilful violation thereof) thereby relegating them, state officers and departments, to seventy-six (76) separate actions at law or in equity in many different forums in numerous states?

III.

Was it not the duty of the specially constituted three-judge District Court, upon consideration of the fact that it found the issues on the injunction matter in favor of the defendants, to remand the Motion For Damages to the single judge, who granted the temporary restraining order and fixed its conditions, for proceedings to be taken thereon independently of the provisions of Section 266 of the Judicial Code?

STATUTES AND REGULATIONS INVOLVED.

This proceeding involves construction of pertinent portions of the Missouri Bus and Truck Law, Laws of Missouri, 1931, pages 304-316, Sections 5264-5280, inclusive, which will be incorporated herein to the extent needed. It also involves consideration of Public Service Commission regulations promulgated thereunder (R. 90-93).

STATEMENT OF THE CASE.

Preliminary explanation. In an injunction proceeding, arising under the provisions of Section 266 of the Judicial Code, a three-judge district court, Western District of Missouri, overruled defendants' Motion For Damages (R. 83, 79), against seventy-six common carrier truck operators; plaintiffs, and the surety on their two injunction bonds. The Eighth Circuit Court of Appeals affirmed the order, with one judge dissenting.

The aforesaid Motion For Damages (R. 79) of defendants, Public Service Commission, State Highway Commission, Superintendent of the Missouri State Highway Patrol, and Honorable Roy McKittrick, Attorney General of the State of Missouri, each in its or his own behalf and each in behalf of the State of Missouri, and of the State Treasurer of the State of Missouri, was filed in the District Court on May 22, 1939. It requested the Court

> ". . . . . to determine and assess damages and costs against each and every plaintiff in said cause and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed."

On July 5, 1939, the specially constituted District Court, consisting of three judges, without any hearing whatsoever, overruled the aforesaid motion in the following language (R. 83):

> "It appearing to the Court that the *subject matter* and and relief prayed for in defendants' motion for damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion referred to is hereby overruled." (Emphasis supplied.)

The Court's reference was to its prior dismissal of the Counterclaim which included a claim for fifteen months license fees, only. It had also been overruled without any hearing whatsoever.

The circumstances leading up to the appeal from the aforesaid order are as follows:

Remote History of Case. On May 15, 1937, the aforesaid seventy-six (76) common carriers of property by motor vehicle filed their bill in equity (R. 3-18), wherein they requested that defendants named therein (petitioners here) be restrained from enforcing against them the provisions of the Missouri Bus and Truck Law, Laws of Missouri, 1931, Sections 5264-5280, pages 304-316, inclusive. The principal attack of the plaintiffs was lodged against the common carrier fees provided in Section 5272 of said law for the maintenance and repair of public highways of the State of Missouri.

It was alleged in the petition that said statutory fees were excessive in amount, bore no reasonable relation to the use or extent of use of said public highways and were therefore unconstitutional and void. Also, on May 15, 1937, a single district judge, who afterwards called to his aid two additional judges as provided by Section 266 of the Judicial Code, granted a temporary restraining order (R. 18). The temporary restraining order was amended by said single judge (R. 20) on May 27, 1937, to include a stipulation of parties, whereby plaintiffs agreed to purchase *free of cost* from defendant Public Service Commission annual licenses, and daily licenses called "emergency travel orders," and to deposit the license fees therefor with a trustee for safekeeping until it should be decided by the courts whether the license fees were reasonable and therefore valid. The temporary restraining order remained in effect for a period of approximately fifteen months, namely, from May 15, 1937, until the final decree of the court was entered on August 4, 1938. Collection of the statutory fees by the Public Service Commission for remittance to the State Treasurer was restrained during said period of approximately fifteen months.

In accordance with the aforesaid stipulation (R. 20), by means of which the Court modified its temporary restraining order, a total sum of $104,015.43, representing *partial payment* of emergency and regular license fees deposited with the trustee by twenty-seven (27) of the seventy-six (76) plaintiffs, was remitted to defendant Public Service Commission by the trustee (R. 77-79) on May 17, 1939.

Two injuction bonds, one for Ten Thousand Dollars ($10,000.00) (R. 22 original), and one for Twenty Thousand Dollars ($20,000.00) (R. 30, original), were given by plaintiffs.

The bond for Twenty Thousand Dollars ($20,000.00) *which was filed last,* runs to defendant Public Service Commission of the State of Missouri, defendant State Highway Commission of the State of Missouri, defendant Missouri State Highway Patrol, defendant Attorney General, *also* to the State of Missouri and the State Treasurer of the State of Missouri. It provides that plaintiffs

> " . . . . . shall abide by the decision of said Court and pay all moneys and costs which shall be adjudged against them in case said restraining order shall be dissolved . . . . . "

Defendants' Joint Answer (R. 26) was filed on September 17, 1937. Said Joint Answer contained a *Counterclaim* for license fees owning by plaintiffs (R. 38). Plaintiffs filed a General Denial to the counterclaim (R. 40).

Thereafter, defendants filed an Amended Answer *and Counterclaim* (R. 55), alleging therein that *on behalf of the State of Missouri*, they were entitled to a judgment against plaintiffs for statutory common carrier license fees which plaintiffs would have been compelled to pay as annual and temporary license fees for the maintenance and repair of the public highways, except for the effectiveness of the temporary restraining order for a period of fifteen (15) months.

At the hearing on the injunction matter, the circuit judge who presided over the specially constituted three-judge District Court stated (R. 65, 71) that the Court would "*retain jurisdiction*" of the aforesaid Counterclaim until the injunction matter on the merits had been determined by it.

Several weeks later the Court, on August 4, 1938, without any action whatsoever in the meanwhile concerning the Counterclaim, filed its opinion and entered its *original* final decree (R. 61) disposing of the injunction matter on the merits. The issues in the injunction matter were found for the defendants. The temporary restraining order was dissolved and the request for injunction was denied.

The decree of the three-judge Court also provided (R. 62) as follows:

> "4. That as to the issue raised by the defendants' counterclaim, *not having been urged nor presented by the parties*, and the court being in doubt as to the

> right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised."
>
> (*Emphasized clause omitted in response to Motion to Modify)

Paragraph 4 as modified included the word "*serious*," and reads that, (R. 67):

" . . . . . the Court being in *serious* doubt . . . . . "

On September 3, 1938, defendants filed their Petition for Rehearing and Motion to Modify the Decree (R. 62), which petition asked for (1) an opportunity to try the issues made upon the Counterclaim of defendants and the Answer of plaintiffs thereto, or (2) a modification of the portion of paragraph 4 of the decree stating that the Counterclaim had not been urged or presented by the parties.

On September 16, 1938, the Court ordered (R. 67) that paragraph 4 of the decree be modified, which modification eliminated from paragraph 4, as originally entered, the words, "*not having been urged nor presented by the parties.*" It also was modified to read "*serious doubt.*" Said order also denied and overruled defendants' Petition for Rehearing, and allowed an exception to such rulings.

Thereafter, the defendants duly prosecuted an appeal directly to the Supreme Court against paragraph 4 of the decree, as modified. The plaintiffs, however, did not prosecute an appeal from that portion of the decree of the Court dismissing their Bill of Equity and dissolving the temporary restraining order. The Supreme Court decided (Public Service Commission vs. Brashear, 306 U. S. 204) that,

> "It necessarily follows that, unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction, the provision in Section 266 for a direct appeal to this court has no application. The appeal is dismissed."

An appropriate mandate (R. 76) issued by the Supreme Court was filed in the District Court on April 24, 1939.

The foregoing facts pertaining to the injunction and Counterclaim proceedings set the stage for the present proceeding in certiorari pertaining to the Motion For Damages.

Recent History of Case. *Further historical facts are as follows:*

After the Supreme Court, for want of jurisdiction, had dismissed the aforesaid direct appeal taken from the adverse decree of the District Court on the Counterclaim, it was too late for defendants to appeal from such adverse ruling of the three-judge court on the counterclaim to the Circuit Court of Appeals. They, therefore, conceived it to be proper to incorporate the same subject matter of the Counterclaim pertaining to loss of the license fees during the fifteen months they were restrained, *also a claim for expenses incurred* in preparing and presenting their respective defenses, in a Motion for Damages against plaintiffs and the surety on their two injunction bonds.

The Motion for Damages (R. 79-83), which is the real basis of this appeal and which was filed on May 22, 1939, requested the Court

> " . . . . to determine and assess damages and costs against each and every plaintiff in said cause, and against the Massachusetts Bonding and Insurance Company to the extent of its liability as surety on two injunction bonds herein filed."

On July 5, 1939, the District Court, consisting of three judges sitting as a specially constituted Court under the provisions of Section 266 of the Judicial Code, entered its Order Overruling Motion for Damages (R. 83). The substance of said order is as follows:

> "It appearing to the Court that the *subject matter* and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion above referred to is hereby overruled." (Emphasis supplied).

On July 15, 1939, defendants filed their Motion to Set Aside Order Overruling and to Reconsider Defendants' Motion for Damages (R. 83). Therein (R. 83), defendants set out alleged errors committed by the District Court in overruling

the aforesaid Motion for Damages, and presented Suggestions in Support of Motion to Set Aside Order Overruling and to Reconsider Defendants' Motion for Damages (R. 85).

On July 25, 1939, the Court entered its Order Overruling Motion to Set Aside Order Overruling Defendants' Motion for Damages (R. 89).

Thereupon an appeal from the adverse ruling of the three-judge District Court on the Motion for Damages was duly prosecuted to the Eighth Circuit Court of Appeals and submitted on briefs. The Eighth Circuit Court of Appeals affirmed the judgment and decree of the District Court. It is the opinion of that Court (R. 99) which is now before the Supreme Court for review. The Supreme Court granted certiorari on December 16, 1940 (R. 107).

SPECIFICATION OF ERRORS TO BE URGED.

I.

The opinion of the Circuit Court of Appeals is based upon the erroneous assumption that the district court dismissed defendants' Counterclaim and Motion For Damages, respectively, on the ground of its supposedly discretionary right to relegate defendants to seventy-six (76) separate actions at law to collect the statutory license fees in question, whereas the three orders (R. 61, 67, 83) of the three-judge court pertaining to the Counterclaim and thereafter to the Motion For Damages, respectively, reveal that the District Court dismissed first, the Counterclaim and thereafter the Motion for Damages on the ground that it was "in doubt" and thereafter in "*serious*" doubt as to the right of any of the defendants to maintain such ancillary causes of action for collection of the statutory, road-use license fees involved.

II.

The Circuit Court of Appeals erred in its holding that the specially constituted three-judge District Court did not abuse its judicial discretion by relegating defendants (petitioners here) to seventy-six (76) different actions at law, or in equity, in many different forums in many different states.

III.

The Circuit Court of Appeals erred in that it did not remand the Motion For Damages to the District Court, with directions to the single district judge who granted the temporary restraining order and fixed its conditions to proceed to trial on the merits of said Motion For Damages independently of the provisions of Section 266 of the Judicial Code.

SUMMARY OF THE ARGUMENT.

Specification I.

A. Primary question not decided. When the District Court by its modified decree dismissed the Counterclaim, it said (R. 67):

> "4. That as to the issue raised by defendants' counterclaim, the court being in *serious* doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the defendants, or either of them, to maintain an independent action or suit thereon, if they or either of them shall be so advised." (Emphasis supplied)

Thereafter, when it overruled the Motion For Damages, it said (R. 83):

> "It appearing to the Court that the *subject matter* and the relief prayed for in defendants' Motion for Damages, filed May 22, 1939, has *heretofore* been ruled and finally determined in this cause, the motion above referred to is hereby overruled." (Emphasis supplied)

Thus it appears that the District Court dismissed the Counterclaim and subsequently overruled the Motion For Damages on the ground that it was in serious doubt "*as to the right of the defendants to maintain*" in an ancillary proceeding the cause of action pleaded in the Motion For Damages.

Suggestion is made, therefore, that the Circuit Court of Appeals left wholly undecided the primary question presented, namely, "*as to the right of the defendants* to maintain" in an ancillary proceeding the cause of action pleaded in the Motion

For Damages. This point was urged to the attention of the District Court (R. 83) in a motion to set aside its aforesaid order. It was preserved and fully briefed in the Circuit Court of Appeals. It was urged in the petition for rehearing (R. 121) in the Circuit Court of Appeals. It was finally urged in the printed petition for certiorari in this Court, first, at the top of page 5 thereof and secondly at the bottom of page 10 thereof.

Petitioners believe that the Supreme Court should decide whether or not the Public Service Commission or the Attorney General, (considering all of the circumstances of the injunction proceeding in which they were joined and restrained as defendants in the District Court), are entitled, as a matter of right, in an ancillary proceeding in the District Court, to collect from **or have restitution** of the seventy-six (76) common carrier plaintiffs, for and on behalf of the State of Missouri or the State Treasurer of the State of Missouri, the statutory, road-use license fees which said plaintiffs would have been obligated to pay, **and compelled to pay,** for the use, maintenance and repair of the public streets and highways of the State of Missouri, except for the effectiveness of the improvidently issued temporary restraining order for a period of fifteen (15) months.

B. Petitioners Right Parties to Maintain Motion for Damages. It is the contention of petitioners that *equity alone* invests the Public Service Commission with sufficient right to maintain the ancillary cause of action stated in the Motion For Damages. Obviously, the State is entitled to all of its road-use license fees due from plaintiffs below for the aforesaid period of time. A court of equity should not allow seventy-six (76) interstate carriers to have an order of a District Court to restrain the Public Service Commission, the Attorney General and other law enforcing officers from collection of such fees and thereafter, following dissolution of the improvidently issued restraining order, interpose merely technical reasons as a defense against the effort of said law enforcing agencies to collect said road-use license fees for the State.

In any event, petitioners contend that the Public Service Commission or the Attorney General have more grounds than those based upon equity alone for maintaining the cause of action pleaded in the Motion For Damages.

As to the Public Service Commission, Section 5267-(a), Laws of Missouri, 1931, pages 304-316, inclusive, provides:

> "The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state . . . . . ."

The power to license includes the power to collect, and to maintain an action to collect the license fees, by an action at law or equity, if necessary. Such is the correct legal conclusion when the intent of the act as a whole is considered, and when it is also considered that the Commission has *always* collected the license fees due under the provisions of Section 5272 of the aforesaid law.

As to the Attorney General, Section 11,276, Vol. I, Mo. St. Ann., p. 586, R. S. Mo., 1929, provides:

> "The Attorney General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

Hence, it is contended that both petitioners named above, who were joined as defendants in the injunction petition of plaintiffs, have *legal grounds* for maintaining the ancillary cause of action pleaded in the Motion For Damages.

Specification II.

A. Abuse of Discretion. The statutory license fees, which accrued as "*damages*", accrued by reason of the fact that plaintiffs below flagrantly violated the terms of the temporary restraining order throughout the period of fifteen (15) months it was in effect. Although, by the express terms of the temporary restraining order, plaintiffs were required to deposit the statutory fees in question with the person named as trustee in the temporary restraining order, as amended, (R. 22), each and every one of the seventy-six (76) plaintiffs

violated those terms. They violated them by their failure and refusal to deposit road use fees at least for the shorter distances mentioned in the opinion of the Circuit Court of Appeals. It is suggested that such long continued violation of the terms of the temporary restraining order constituted a grave fraud against the rights of the State of Missouri, and a flagrant contempt of the District Court itself.

Concerning two contempt motions, and the counterclaim, the subject matter of which was later incorporated in the Motion For Damges, now in question, the presiding judge of the three-judge District Court said (R. 65, 71):

> "We may clear up part of it now. The *cross complaint* and the contempt motions in this case, if the Court should sustain the position of the defendants, *we will retain jurisdiction of those matters*, but will not hear them now." (Emphasis supplied.)

The fraud went without remedy. The three-judge court, although assuming jurisdiction, refused to do anything whatsoever. It dismissed the counterclaim without giving defendants an opportunity to be heard. Later, in like manner, it overruled defendants' Motion For Damges. Such transactions, *when considered together*, as connected incidents, constitute an arbitrary action and an abuse of discretion on the part of the three-judge District Court.

In addition to the foregoing suggestion, the suggestion is also made that the act of relegating state agencies and officers (petitioners here) to seventy-six (76) separate actions at law or in equity in many different forums in numerous States constitutes an abuse of judicial discretion in itself. It does not seem to comport with the principles of equity that a district court could "*retain jurisdiction*" for fifteen (15) months, and throughout said period of time restrain the collection of legally owing road-use license fees, which it required should be deposited with a trustee, and which it required to be protected from loss to the State by two injunction bonds in the aggregate amount of Thirty Thousand ($30,000.00) Dollars, and thereafter relegate defendant state officers and agencies to a multiplicity of actions in many forums in various States to collect said fees. Especially does the action of the Court seem not equitable in view of the fact that the fees now owing and unpaid are so owing and unpaid as a *direct result* of violations

by plaintiffs below of the temporary restraining order. The State, through its Public Service Commission or Attorney General, is entitled to have *restitution* of these license fees in the same Court which improvidently restrained collection thereof.

The Circuit Court of Appeals, without commenting upon the aforesaid pertinent fact, decided that the District Court did not abuse its discretion. If the District Court did so decide, suggestion is made that the Supreme Court should protect the defendants against the arbitrary transgression of their rights by the three-judge District Court, also against the error of the Circuit Court of Appeals.

Specification III.

A. Proper rule for trial of Motion for Damages. The majority opinion of the Circuit Court of Appeals holds that (R. 104):

> "the proper procedure in such a situation as here presented *requires* that the three-judge court, which has discharged its essential function of adjudicating upon constitutionality, *should*, upon presentation of facts by the parties, remit such ancillary litigation to the District Judge for proceedings 'to be taken independently of Section 266 of the Judicial Code, ... ' "
> (Emphasis supplied.)

The Circuit Court of Appeals announced the foregoing mandatory rule, and immediately disregarded it. The dissenting opinion holds that the foregoing rule of the majority opinion is a sound one for three-judge district courts which are confronted with an ancillary cause of action while they are considering an injunction matter under the provisions of Section 266 of the Judicial Code. The dissent is based upon conflict between the rule announced in the majority opinion and the action of the Circuit Court of Appeals in affirming dismissal of the Motion For Damages by the three-judge District Court.

It is the position of petitioners that if the Circuit Court of Appeals announced a correct rule of procedure, it erred in not following it in the case at hand.

Obviously, it is unimportant to petitioners whether their Motion For Damages, being essentially a request for *restitution* of the common carrier license fees withheld by plaintiffs

below, should be tried on the merits before the single district judge who granted the temporary restraining order and fixed its conditions or the specially constituted three-judge district court. They should have their day in court on the merits in either case. Suggestion is made that the Supreme Court should prescribe the proper rule to be followed under the present circumstances, and thereupon remand the Motion For Damages to the District Court for trial on the merits in accordance with said rule.

ARGUMENT

I.

A. Preliminary Suggestions.

In the **Summary of the Argument** an effort has been made to present a concise appreciation of the merits of this proceeding in certiorari in the Supreme Court. The points therein discussed may now be expanded, supported and strengthened by an application of the pertinent statutes and rules of petitioner Public Service Commission of the State of Missouri, also by a discussion of pertinent case law.

As a preliminary clarification, however, as to which of the three questions for decision *must necessarily be decided*, the following explanation is submitted, to-wit:

If this Court should decide that, in accordance with rules of equity or on purely legal grounds, (1) either the Public Service Commission or the Attorney General are proper parties to maintain the cause of action pleaded in the Motion For Damages, then it should further decide (2) whether or not dismissal of the Motion For Damages on the ground that the District Court exercised a judicial discretion, and thereby relegated defendants below (petitioners here) to seventy-six (76) separate causes of action in many forums in numerous States, constitutes an abuse of judicial discretion. It is obvious that, in order to settle the litigation in this proceeding, the Supreme Court should decide the second question presented if it should decide the first one favorably to the petitioners.

It is also obvious that, if the Supreme Court should decide both (1) and (2) favorably to petitioners, it should then *announce* (3) a clear rule of procedure for trial on the merits of the Motion For Damages, or other ancillary cause of action, in the District Court, i. e., whether, when an ancillary cause of action for *affirmative relief or for restitution* of something withheld by a temporary restraining order granted in a principal proceeding instituted under the provisions of Section 266 of the Judicial Code, such Cross-bill, secondary or incidental cause of action must be remanded by the statutory three-judge District Court to the single district judge who

granted the temporary restraining order and fixed its terms and conditions for proceedings thereon independently of the provisions of Section 266 of the Judicial Code.

B. Primary Question for Decision: Are petitioners (defendants below), or any of them, proper parties to maintain the Motion For Damages, as an ancillary cause of action in the District Court?

It is the conviction of petitioners that this was the primary question to be decided in both courts below. It is contended that the District Court erroneously decided it adversely to defendants. The Circuit Court of appeals erred in that it misinterpreted the decree of the District Court and therefore did not decide the question at all. The necessity of its decision is at the very threshold of a review of the opinion of the Circuit Court of Appeals. Concededly, if none of the petitioners (defendants below) are endowed with power or authority to maintain, on any grounds, the Motion For Damages in an action in the District Court, this proceeding in certiorari may be finally and completely determined by such a decision.

It is also the conviction of petitioners that the three-judge District Court clearly evidenced its decision concerning the right of the defendants to maintain the action, in the following language of paragraph 4 of the decree, as amended (R 67):

> ". . . and the court being in *serious* doubt as to the right of the defendants to maintain such counterclaim, it is ordered that the same be and it hereby is dismissed . . ." (Emphasis supplied).

Thereafter, (R 83), speaking of the Motion For Damages, the specially constituted three-judge District Court said:

> "It appearing to the Court that the subject matter and relief prayed for in defendants' motion for damages, filed May 22, 1939, has heretofore been ruled and finally determined in this cause, the motion referred to is hereby overruled."

The Circuit Court of Appeals interpreted the aforesaid language as constituting a dismissal of the Motion For Dam-

ages on the ground that the District Court *was exercising a judicial discretion* to relegate defendants below (petitioners here) to seventy-six (76) separate causes of action in many forums in various States. It is not believed that the three judges composing the statutory District Court so intended. Its own plain language does not support the interpretation placed thereon by the Circuit Court of Appeals. It is suggested, therefore, that the District Court *did not exercise a judicial discretion* to relegate defendants below (petitioners here) to seventy-six separate actions at law or in equity, but that *it affirmatively decided* in its modified decree that it entertained such "*serious*" doubt as to the right of defendants below (petitioners here), or any of them, to maintain the cause of action pleaded in the Motion For Damages as to justify it in dismissing said motion. The deliberate adding of the word "*serious*" to the amended decree is significant. The Court was surely thinking of defendants in terms of proper parties to maintain the action. It was not thinking of its own discretion to proceed.

Moreover, one of the judges in the instant three-judge court sat as one of the three judges in the case of **Eichholz v. Hargus,** et al., 23 Fed. Supp. 587. There l. c. 599-600, in a dissenting opinion he clearly showed the basis of the "serious doubt" entertained by himself, at least, as to the right of the Public Service Commission to maintain the cause of action stated in the Motion For Damages. He based his serious doubt in that case on two reasons, namely, (1) that the Counterclaim in the Eichholz case was not one comporting with the requirements of Equity Rule 30, and (2) that the State itself or the State Treasurer, and not the Public Service Commission should maintain the cause of action for the license fees owing. These ideas were not in accord with those of other two judges who sat in the Eichholz case.

The Rules of Civil Procedure for the District Courts of the United States became effective September 1, 1938. The Motion For Damages was not filed until May 22, 1939. Therefore, it was not subject to scrutiny under Equity Rule 30.

Moreover, the criticism of the dissenting judge in the Eichholz case in connection with Equity Rule 30 is not equivalent to saying that he believed the Court in that case should exercise its judicial discretion and relegate the defendants in that case to an action at law against the plaintiff.

Equity Rule 30 pertained to the nature and essence of a proposed counterclaim. The exercise of judicial discretion to relegate parties to another court is a different thing entirely.

Since the Motion For Damages, filed on May 22, 1939, was not subject to scrutiny under Equity Rule 30, it may be inferred that the reason of one of the judges for overruling it was based solely upon his second criticism of the counterclaim in the Eichholz case, namely, that the State itself or the State Treasurer and not the Public Service Commission is the right party to maintain the cause of action pleaded in the Motion For Damages.

Therefore, it is the conviction of petitioners that the secondly named objection of the dissenting judge in the Eichholz case to the counterclaim in that case is the same objection he entertained against the instant Motion For Damages. It is suggested therefore that the other two judges sitting in this case below agreed with him. If so, the Motion For Damages was not overruled on the basis of an exercise of judicial discretion to relegate defendants to seventy-six (76) separate actions instead of allowing them to proceed to try the Motion For Damages in the District Court where it originated either before the three judges thereof or before the single judge who granted the temporary restraining order. It was dismissed on the point that the District Court believed neither the Public Service Commission nor any of defendants were the right parties to maintain such an action.

In any event, it seems necessary that the Supreme Court should decide the question. If it should be assumed that the District Court decided the question in favor of defendants below (petitioners here), the Supreme Court would have authority in this proceeding to affirm or reverse such decision.

C. Equity alone invests petitioners with right to maintain Motion For Damages.

As stated in the summary of the argument, it is the position of petitioners that *equity alone* invests the Public Service Commission, as well as the Attorney General, with sufficient *right* to maintain the cause of action pleaded in the Motion For Damages. Whether it should be maintained before the single judge who granted the temporary restraining order and fixed its conditions or before the statutory three-judge court itself is of little importance. The State, obviously,

is entitled to the fees in question. They have been withheld because of the temporary restraining order, which was flagrantly violated by all of the plaintiffs below as to the payment of license fees for operations into Missouri by those plaintiffs who terminated some or all of their westbound interstate traffic in St. Louis, Missouri, during the period of the temporary restraining order. Approximately thirty of the plaintiffs below terminated all of their westbound interstate traffic operations in St. Louis, Missouri, and the remainder of them terminated some of their westbound interstate traffic operations in St. Louis, Missouri. For these 10 or 20-mile distances into Missouri, none of the seventy-six (76) plaintiffs made application to the Public Service Commission for annual licenses at the rate of one-third or one-half the regular annual license fee. None of them purchased "travel orders" for these operations. Hence, none of them deposited with the trustee, as required by the terms of the temporary restraining order, the license fees for the 10 and 20-mile distances as provided by Section 5272 of the law in question.

Under the rules of equity, it is suggested that the Public Service Commission, which has always at the time of licensing commercial vehicles used in transporting property for hire collected the license fees, whether consisting of annual license fees or so-called emergency fees on vehicles not regularly operated into the State, is entitled to maintain on behalf of the State of Missouri, the real party in interest, the cause of action stated in the Motion For Damages. So is the Attorney General. So are the other two defendants named in the injunction suit.

Indeed, plaintiffs below instituted their injunction suit on the theory that defendants below (petitioners here) were the right parties to restrain and enjoin in order to protect themselves against arrests for collection of the statutory license fees in question. They did not join the State Treasurer as a defendant. Evidently, they did not believe that he is a right party to institute arrests against themselves for collection of the license fees in question. Will equity permit them to select the defendants whom they represent to the equity court as the right parties to restrain to prevent collection of the allegedly unconstitutional license fees and thereafter hear them to say that those defendants are not the right parties to maintain a cause of action, incidental

to their injunction suit, for collection on behalf of the State the license fees in question, which fees they would have been forced to pay under penalty of arrests except for the effectiveness of the Court's temporary restraining order? The District Court has resolved the question in favor of plaintiffs. Equity abhors such a conclusion.

Moreover, by means of the stipulation (R 20) which became a part of the temporary restraining order, the plaintiffs voluntarily recognized the Public Service Commission as the right party to whom to pay the license fees in question. They said they would deposit the fees owing by them to the Commission, for the use of the State, with the trustee. Twenty-seven of plaintiffs deposited $104,015.43 with the trustee. On stipulation (R 77-78) they released said amount to the Public Service Commission on May 17, 1939, in payment for annual licenses and travel orders which had been furnished during the pendency of the litigation.

Surely, therefore, defendants below (petitioners here) are the right parties to maintain as an incident to the main proceeding in equity the Motion For Damages, and thereby preserve the equitable rights of the State of Missouri, *whose agents they are.* Said agents, one or more of them, have at least an equitable right to maintain the Motion For Damages for their principal, the State of Missouri.

Finally, plaintiffs below by their General Denial (R 40) put in issue the cause of action pleaded by defendants for collection of license fees. They did not attack the right of the defendants to maintain such cause of action. The dismissal thereof was a purely gratuitous, erroneous action of the three-judge district court.

A certain Supplemental Statement (R 75), which became a part of the record at the time of the direct appeal on the Counterclaim to the Supreme Court, contains certain statements calculated to create the impression that there was an understanding between the parties that the provisions of the stipulation should not be strictly observed. Petitioners deny that there was anything said or done by defendants, or any of them, justifying plaintiffs' placing any self-serving construction on said stipulation. On the contrary, petitioners expected that the Stipulation of Parties (R 20) would be completely and equitably fulfilled by all parties thereto during the period of time the temporary restraining order would be

in effect. Said stipulation having been incorporated by consent of the parties into the Temporary Restraining Order, it was the duty of all parties to obey it. The record clearly discloses that all seventy-six (76) of the plaintiffs violated that stipulation within the City of St. Louis where at that time the enforcement problem was well known by plaintiffs to be most difficult.

D. Missouri Statute authorizes Public Service Commission to collect license fees in question.

Section 5267-(a) of the Missouri Bus and Truck Law, Laws of Missouri, 1931, provides:

> "*Power and Authority of Public Service Commission.* The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise, and regulate every motor carrier in this state . . . . ."

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. The Court should have no difficulty in deciding that the administrative agency committed with the duty of issuing annual and temporary licenses was intended by the General Assembly also to be the state agency for collection of the license fees. Any other interpretation of the statute convicts the General Assembly of blundering. The Court will credit it with having intended to enact a practical, workable law.

Moreover, Section 5267-(b) provides:

> "The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined . . . . ."

It should be emphasized that Section 5267 is a section expressly designated as "*Power and Authority of Public Service Commission*". Said section gives the Commission **"power"** to license motor carriers. It gives the Commission **"authority"** to license motor carriers. It provides that it shall be the **"duty"** of the Commission to license motor carriers. It is stated again that the **"power and authority and . . . . duty"** of the Commission to license motor carriers implies **"power**

and authority and . . . . . duty" to collect all license fees imposed upon motor carriers.

Section 5268-(b), among other things, provides:

> ". . . that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued *only upon the payment of such fees as may be designated by the Public Service Commission* . . . . ." (Emphasis supplied).

Section 5268-(b) further provides:

> "Such ports of entry or exit *may be established by the Commission* as in its judgment may be necessary for the proper administration of this act. In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port *shall be paid out of the receipts at each port* derived from the sale of temporary permits to interstate carriers." (Emphasis supplied).

Respondents may contend that the Treasurer alone is the one authorized to receive and accept payment.

They refer to Section 5272. Said section is not one of **"powers"** of the Commission. It certainly is not a section defining the **"powers"** of the State Treasurer. It simply states what administrative practice the Commission shall follow in collecting "*the annual license fee*" from motor carriers. That the State Treasurer is the mere payee or **"receiver"** of such fees is evidenced toward the end of Section 5272-(a) wherein it is provided that,

> "The Commission, upon issuance of a license for any vehicle, as defined in this Act, shall notify the State Treasurer who shall receive the license fee for such vehicle . . . . . ."

Obviously, the State Treasurer is wholly uninformed concerning the matters pertaining to fees in the law in question. The Commission must **"notify"** him. Thereupon, he **"shall receive the license fee".**

Section 5272-(a) provides in part as follows:

"In case of emergency or usual temporary demand for transportation, the license fee for additional motor vehicle for limited periods *shall be fixed by the Commission* in such reasonable amount as may be prescribed by general or temporary order."

Section 5272-(a), therefore, expressly says that the emergency or travel order fees shall be **"fixed by the Commission."** The Commission not only fixes the travel order fees, but it prints the travel order forms and sells them, and collects the travel order fees.

Indeed, plaintiffs (R. 78), out of a total of $104,015.43 remitted $81,805.00 to the Commission in the form of emergency or travel order fees.

It is therefore contended that if Section 5272-(a) confers "*power*" upon the State Treasurer to collect **"the annual license fee"**, it confers "*power*" upon the Commission to collect **"the license fee"** for emergency travel. **Appellants contend that the Commission has the power, express or implied, to collect all fees.** The State Treasurer, on the other hand, is authorized to **"receive"** license fees from the Commission.

As a matter of fact, by an intervening motion (R. 23), approximately twenty (20) of the plaintiffs submitted to the jurisdiction of the District Court upon the proposition that (R. 24),

". . . . . they are ready and willing to enter into such reasonable stipulations as may be agreed upon with reference to making of daily reports on *emergency travel orders* to the end that proper records may be maintained."

The Court (R. 26) sustained their motion to intervene on the ground that they would file an injunction bond in the amount of Twenty Thousand Dollars ($20,000).

It is true that Section 5272-(a) provides as follows:

"In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act, shall, at the time of the issuance of a

certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1, and January 15, of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; . . . . . "

But it is the contention of defendants that the language aforesaid merely indicates that the annual license fees mentioned should, upon remittance to the Public Service Commission, be deposited in the state treasury. The treasurer is the mere payee who must receive State moneys from various State officers or departments authorized to collect State moneys. It is admitted that the Commission requires, as an administrative practice, that all checks for fees shall be made payable to the order of the State Treasurer. All cash received for fees is safely kept by the Commission and promptly deposited in the state treasury.

Section 5280 provides as follows:

"It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public; and that no right, privilege, or permit granted or obtained under or by virtue of this act shall ever be construed as a vested right, privilege, or permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this act and the power and right to alter, amend or repeal this act at its pleasure."

Without further discussion of them, it is submitted that the foregoing sections of the law in question show a legislative intent to vest in the Public Service Commission authority to maintain actions at law or in equity for the purpose of collecting on behalf of the State of Missouri the statutory fees mentioned in Section 5272 aforesaid.

E. Public Service Commission Rules reveal it has always collected license fees.

Public Service Commission rules (R. 90-93) clearly reveal that the Commission itself has always required motor vehicle

operators, subject to the aforesaid Missouri Bus and Truck Law, to remit to it all types of fees, including (1) fees for annual licenses, (2) fees for temporary or occasional permits, or (3) fees for emergency or usual temporary demand for transportation.

Rule No. 8 provides (R. 90) that,

> "Each interstate carrier . . . . . shall pay the fees in advance for said **temporary permit** as hereinafter set out:
>
> | | |
> |---|---|
> | More than 1 ½ tons and not more than 4 tons... | $2.00 |
> | More than 4 tons and not more than 7 tons.... | 4.00 |
> | More than 7 tons and not more than 9 tons.... | 7.00 |
> | More than 9 tons..... | 9.00" |

Similar provision is made for **temporary fees** for passenger-carrying vehicles.

Rule No. 13, relating to ports of entry, provides (R. 91) that,

> "Temporary interstate permits may be issued at the ports of entry which have been duly and legally designated by the Commission. The holder of such interstate permit card may enter this state through the port of entry after securing said temporary interstate permit card from the keeper of said port of entry . . . ."

No provision is made in the statute, or the rule pertaining to ports of entry, that a representative of the State Treasurer shall be present to collect fees from interstate operators. The statute and the rules clearly show that the Public Service Commission shall fix and collect such fees.

In like manner Rule No. 14-B, pertaining to vehicles using travel orders, provides, as also does the statute, that the Commission shall not only fix the **travel order fees,** but shall collect them from the carriers from time to time.

As an illustration, it is provided in such latter rule (R. 92) that,

> "The Commission will issue such extra travel order forms in triplicate to any certificated operator in books of 5,

10, or 25, or at the request of the operator one such travel order may be purchased.

. . . . . .

The operator will be required to purchase and pay in advance for such extra travel order or orders at the time of issue by the Commission. The fee to be paid for said emergency travel order or orders shall be as follows: . . . . . ."

Furthermore, Rule No. 15-B, also pertaining to issuance and use of travel orders, provides in part (R. 93) as follows:

"The Commission will have on hand for the purchase by the operator desiring travel orders blank books containing 5, 10, and 25 emergency travel orders.

* * * * * *

Any operator may purchase one travel order upon the payment of the required fee as set out in that rule."

Therefore, both the statute and the rules promulgated thereunder clearly show that the Public Service Commission is a proper party to maintain an action to enforce payment of delinquent fees aforesaid.

F. Implied powers of Commission.

Finally, attention of the Court may in this brief be properly directed to additional powers of the Commission over motor carriers which are engrafted upon the Missouri Bus and Truck Act.

Section 5267-(c) of the latter Act provides:

"All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided."

Upon inspection of the original Public Service Commission Act, R. S. Mo. 1929, the following sections are of interest:

Section 5123,

"A public service commission is hereby created . . . . with and possessed of the powers and duties in this

chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually *all the purposes* of *this chapter.*"

Section 5127,

"It shall be the duty of the general counsel . . . . . to represent and appear for the commission in all actions and proceedings involving any question under this or *any other law* . . . . . ."

Section 5131,

"The Commission may sue and be sued in its official name."

Section 5163,

"The Commission shall have the **general supervision of all common carriers** . . . . . and shall examine the same . . . with respect to their compliance *with all the provisions of law,* orders and decisions of the commission and charter requirements. . . . . ."

Section 5166,

"The Commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing to be done or omitted to be done by **any common carrier** . . . *in violation of any provision of law* or in violation of any order or decision of the commission.

Section 5229,

"An action . . . . . to enforce the powers of the commission under this *or any other law* may be brought in any circuit court in this state **in the name of the state of Missouri** and shall be commenced and prosecuted to final judgment by the general counsel to the commission . . . . . ."

Section 5230,

"Complaint may be made by the commission . . . . . setting forth any act . . . . . in violation, or claimed to be in violation, *of any provision of law.* . . . . ."

Section 5236,

"All actions or proceedings under this *or any other chapter,* . . . . . to which the commission or the state may be parties, and in which any question arises under this *or any other chapter,* shall be preferred over all other civil causes . . . . . ."

It is suggested that the above additional language of various sections of the Missouri Public Service Commission Act indicates a legislative intent to empower the Commission to do anything reasonably necessary to carry into effect and to enforce all provisions of law applicable to common carrier motor vehicles, whether contained in the Missouri Bus and Truck Law or the original Public Service Commission Law.

From the foregoing statements of equitable principles, applicable statutes and administrative rules the petitioners submit that the Public Service Commission is a proper party to maintain the Motion for Damages for collection of the fees in question, either in its own name or in the name of the State of Missouri or the State Treasurer of the State of Missouri. Indeed, by statutory provision and the long established rules of the Commission, the Commission has been *recognized* as the proper party to collect the fees, either in its own name or as an agent of the State or of the State Treasurer. Respondents in their Bill in Equity conceded that, in order to have the protection desired, they should restrain the Public Service Commission from proceeding to collect the fees which were alleged by them to be unconstitutional. They did not name the State Treasurer as a defendant. Inasmuch as they owe such fees, and pledged they would pay them, the rules of equity should operate to compel them to fulfill their legal and moral duty.

C. Eichholz case holds Commission proper party to maintain action for fees.

In the case of **Eichholz vs. Hargus, et al., 23 Fed. Supp. 587,** the three-judge District Court, Western District of Missouri, Central Division, on March 24, 1938, made the following conclusion of law (l. c. 594):

> "IV. That the plaintiff is indebted to the State of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgement therefor."

In the Eichholz case the three-judge court had under consideration a counterclaim filed by the Public Service Commission of the State of Missouri. There Eichholz was resisting, also under the provisions of Section 266 of the Judicial Code, the revocation by the Commission of his authority to operate. In the instant case, the Brashear plaintiffs were directly resisting the authorty of the Commission and other defendants to compel them to pay the fees in question, on the grounds that said fees were unreasonable and therefore unconstitutional. Therefore, the facts in the Brashear case are stronger in favor of upholding the right of the Public Service Commission to recover the delinquent fees than they were in the Eichholz case.

In the Eichholz case the three-judge District Court said in part as follows:

> "While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, **there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.**
>
> * * * * * * *
>
> No objection having been made to the filing of the counterclaim, this court will not interpose one under the circum-

stances of the case. The question having been presented, it should be considered by us. (Emphasis supplied.)

* * * * * *

The parties will be given thirty days from the filing of this opinion to agree upon the amount of the accumulated fees due under the counterclaim. If such agreement is not made within that time or within an extension for that purpose granted within that time, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction and appointing a special master to determine the amount of fees payable under the counterclaim.

If such agreement as to fees is reached within the time above allowed, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction, dismissing the bill upon its merits and awarding recovery upon the counterclaim for the amount so agreed upon."

The record of the three-judge District Court in the **Eichholz case** reveals that the parties failed to agree upon the amount of fees payable under the counterclaim, and that the three-judge Court appointed a special master. After hearings, the special master submitted his report and the three-judge Court rendered judgment,

". . . . that defendant, Missouri Public Service Commission, have and recover for the State of Missouri from the plaintiff, on the counterclaim of the defendant, the sum of $23,314.50, together with its costs."

A direct appeal was taken by Eichholz to the Supreme Court of the United States. **In Frank Eichholz vs. Public Service Commission, 306 U. S. 268,** the Supreme Court disposed of the appeal, so far as the counterclaim was concerned, in the following statement:

"By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the State for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. *The District Court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is*

not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this Court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute." (Emphasis supplied.)

In other words, the Supreme Court in the Eichholz case upheld the jurisdiction of the specially constituted three-judge District Court to allow the Public Service Commission to maintain an action to collect fees like those in question from Eichholz. If the Supreme Court, upon having had called to its attention the fact that the three-judge District Court took jurisdiction of the counterclaim and allowed the Public Service Commission to prosecute it to a judgment against Eichholz, should have decided that the three-judge District Court was without jurisdiction to permit the Public Service Commission to prosecute the counterclaim, *it was its duty* to have reversed and remanded the action of the three-judge District Court on the counterclaim, on the ground that the three-judge District Court had no jurisdiction thereof. It did not do that.

H. Attorney General also may maintain action to collect fees.

Although petitioners stand primarily upon the proposition that the Public Service Commission is the proper party to maintain an action to collect the fees in question, it is also contended that the Attorney General, the chief counsel of the State, one of the defendants named in the Bill of Equity, is a proper party to maintain an action in the name of the State for the collection of the delinquent fees herein mentioned.

Section 11276, Volume I, Missouri Statutes Annotated, page 586, provides as follows:

"The Attorney General shall institute, in the name and on behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear

and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

State v. Creamery Co., 211 Mo. App. 116, 245 S. W. 361; State ex rel. v. Williams, 221 Mo. 227, 260, 120 S. W. 740; State ex rel. v. Bronson, 115 Mo. 271, 21 S. W. 1125.

II.

A. Preliminary discussion.

If the Court has decided in I that one or more of defendants below (petitioners here) are entitled to maintain the Motion For Damages in the District Court, it is necessary that it should decide the question of abuse of discretion.

Therefore, the same principles advanced in I-C to support the contention there, (namely, that upon the basis of equitable principles alone one or all of defendants below should be permitted to maintain in an ancillary proceeding in the District Court, either before the single judge who granted the temporary restraining order and fixed its terms and conditions or before the specially constituted three-judge court, the cause of action pleaded in the Motion For Damages to recover road-use license fees which plaintiffs below would have been forced to pay under penalty of arrests except for the effectiveness of the temporary restraining order of the equity court), should be considered to support the contention that the three-judge District Court abused its discretion by overruling defendants' Motion For Damages.

B. Secondary question for decision: Did the specially constituted, statutory three-judge District Court abuse its discretion by overruling defendants' Motion For Damages?

The very fact that an equity court allowed seventy-six (76) interstate carriers, plaintiffs below, to have the benefit of its powers to restrain the state agency entrusted with administration of the state act in question for a period of fifteen months from forcing payment of statutory state license moneys, constituting remuneration for actual use of the public streets and highways, imposes upon the same equity court the duty to do equity to the restrained party or parties. In the instant case equity imposes upon the district court the duty to allow the Public Service Commission and the Attorney General,

either or both, to proceed to trial on the Motion For Damages, which includes a claim for the statutory license fees in question and proper expenditures of defendants below (petitioners here) for preparing and presenting their respective defenses to the injunction suit.

It was a plain abuse of judicial discretion to ~~regulate~~ relegate the defendants below (petitioners here) to the immense burden of filing and prosecuting seventy-six (76) different causes of actions, in law or in equity, in many different forums in numerous states, **IF** the specially constituted district court based its dismissal of the Motion For Damages on the ground of judicial discretion so to relegate defendants to such multiplicity of suits in many forums in numerous states. The fact that plaintiffs below flagrantly violated the terms of the temporary restraining order by failure and refusal to deposit license fees for the shorter distances involved for fifteen months while they were protected against arrests seems to impute to the specially constituted three-judge district court a high degree of abuse of judicial discretion, **IF** the judges thereof consciously considered the situatior before them, and **IF** the dismissal of the Motion For Damages is actually based on the ground of judicial discretion to relegate defendants to the multiplicity of suits already described.

Now is a proper time to emphasize that petitioners do not believe that the specially constituted district court based its dismissal of the Motion For Damages on the grounds of judicial discretion to relegate defendants below to a multiplicity of actions. They believe that the dismissal of their Motion For Damages was based upon the "*serious doubt*" which the district court entertained "*as to the right of the defendants to maintain*" the cause of action pleaded, first, in the Counterclaim and, second, and thereafter, in the Motion For Damages.

If the District Court based its dismissal upon the grounds that none of the defendants below (petitioners here) are the right party or parties to maintain the Motion For Damages, *it erred.*

Such error has been fully discussed under question I. But **IF** the District Court based its dismissal of the Motion For Damages on the aforesaid ground of judicial discretion to relegate defendants below (petitioners here) to a multiplicity of suits, *then it abused its judicial discretion.*

C. Discussion of Applicable Decisions.

(1) **United Motors Service, Inc. v. Tropic-Aire, Inc.**, 57 Fed. (2d) 479, has been cited by the Circuit Court of Appeals in support of the rule which is said to be in effect in the Eighth Circuit. In another particular the dissenting judge has already pointed out the inapplicability of that opinion to the instant case.

On the question of abuse of discretion the Tropic-Aire opinion is palpably not applicable in the instant case. In the Tropic-Aire case only one action at law in a single forum against a single defendant was involved. It is comprehensible that in such a case there would be no injury done to relegate one to a single action at law against a single defendant, and perhaps in the same forum as the equity suit. But it is incomprehensible that the District Court did not abuse its discretion when it relegated numerous state officers and state departments, defendants below, to seventy-six (76) actions at law in many different forums in many different states.

It is suggested that a rule relegating one defendant to a single action at law in a single forum, which does not constitute an abuse of discretion, is wholly inapplicable to a situation where numerous state officers, as defendants, seeking recovery of state license fees, are relegated to seventy-six (76) actions at law in many different forums in many different States. The Circuit Court has not followed the underlying principle of the rule pertaining to a proper exercise of judicial discretion. It has undertaken to establish a new rule.

Whether the action of the Circuit Court of Appeals should be regarded as a perversion of the existing rule or the establishment of a new one it has announced a dangerous precedent for a court of the United States. It practically guarantees Federal immunity to far-flung interstate enterprises who may collectively contrive to violate state laws. They can come in veritable swarms to violate state taxing or other laws. Upon exertion of efforts by inadequately staffed state administrative agencies such swarms of interstate law violators can bring injunction proceedings in a Federal district court in the Eighth Circuit, and, after tax collections have been restrained for more than a year, they can scurry back to their various foreign residences entirely without the reach of the arm of justice, an arm of justice rendered more feeble by

operation of an improvident rule in the Courts of the United States.

Inasmuch as the opinion does not discuss the great dissimilarity between the instant case and the Tropic-Aire case, it is believed that the Circuit Court overlooked that a rule governing the particular ancillary matter in the Tropic-Aire case could not extend to the state officers in the ancillary matter in the instant case involving a claim against seventy-six (76) plaintiffs with residences in many different forums in many different states. There might just as well have been 500 of these interstate trucker plaintiffs. If that number had been involved, would the Circuit Court still say the rule in the Tropic-Aire case would hold good concerning a similar ancillary matter? Evidently, the Circuit Court overlooked the difference between slight inconvenience in the Tropic-Aire case, on the one hand, and a great, insurmountable, injurious burden, on the other hand. The insurmountable burden arbitrarily imposed upon the state officers by the three-judge court gives the color of complete triumph to the seventy-six (76) law violating plaintiffs. Unless the action of the three-judge court is set aside and the State of Missouri is given an opportunity to have damages and costs ascertained and assessed in this case, the plaintiffs will have used the Federal Court to defraud the State of Missouri of thousands of dollars and the Court will, by its indifference and abuse of discretion, have contributed to their unjustified financial victory.

Even in the case of **United Motor Service v. Tropic-Aire,** 57 F. (2d) 479, relied on as authority in the Eighth Circuit for affirming the order dismissing the ancillary cause of action, the Court clearly indicated that it would be improper to relegate a defendant to an action at law on the injunction bond if **affirmative relief** is asked in defendant's pleading. In that case no affirmative relief was asked in defendant's pleading; hence there was no abuse of discretion by refusing to assess damages under the injunction bond in the equity suit proper. In the aforeasid case the Court said (page 485):

> "Many courts of original jurisdiction have laid down rules with reference to this matter and have regarded it as the **better practice** for the court in the equity suit to determine the damages. For instance, in Owl Creek Coal Co. v. Big Horn Collieries Co. (D. C.), 36 F. (2d) 485, the

court reviews many of the federal decisions upon the subject and states that defendant may in an ancillary proceeding summarily enforce a bond against the surety, and that the **defendant ordinarily will not be permitted to his remedy at law.** Same doctrine, Lea v. Deakin (C. C.), 13 F. 514." (Emphasis supplied.)

(2) The majority opinion, on the question of abuse of discretion, is in conflict with the **Eichholz case, 23 Fed. Supp. 587,** which was tried in the District Court, Western District of Missouri. It is in conflict with other cases in the same and other circuits. In the Eichholz case, a specially constituted three-judge district court, proceeding under Section 266, took jurisdiction of a counterclaim for statutory license fees under Section 5272 of the Missouri Bus and Truck Law and rendered a final money judgment in favor of the Public Service Commission. Only one plaintiff was involved. Here there are seventy-six (76) plaintiffs.

(3) If the action of the three-judge Court in dismissing the Motion for Damages shall be regarded as being based upon an exercise of judicial discretion, it disposed of the matter in a manner in conflict with **the general rule** in effect in all circuits concerning summary action against sureties on injunction bonds. It is in conflict also with the rule in the Supreme Court, as announced in **Russell v. Farley,** 105 U. S. 433, as follows (l. c. 445).

"Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, **to have the damages assessed under its own direction.** This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, **and thus do complete justice, and put an end to further litigation.**"

(4) In **Inland Steel Company v. United States,** 306 U. S. 153, 83 L. Ed. **557, 560,** this Court, speaking of a specially constituted three-judge court, quoted approvingly from Russell v. Farley.

In other words, the Courts, acting as ordinarily constituted one-judge courts, or as specially constituted three-judge courts, have power to exercise a wise judicial discretion. Usually it is fitting that the Court should **"retain jurisdiction"** to do complete justice.

(5) In **Owl Creek Coal Co. v. Big Horn Collieries 36 F.** (2d) 485, (Tenth Circuit), Russell v. Farley, supra, is also quoted at length. Cases from several other circuits are also quoted, showing that Russell v. Farley, supra, is uniformly followed in all the circuits. The Court said:

> "From the foregoing it would appear that **all the federal courts, District, Circuit, and Appellate,** in the cases at least which are cited by counsel, *have been unanimous in adopting the suggestion laid down by the Supreme Court in Russell v. Farley.*
>
> I see no good reason why the rule should not be adopted here, not only upon the reasoning which would seem to sustain it and which is not necessary to reiterate here, but also upon the ground of expediency and order, *with the object in view of seasonably terminating all litigation possible in the same unit.*
>
> For the reasons stated, the motion to strike the second counterclaim will be overruled and denied, reserving to the litigants, respectively, their several exceptions to the adverse rulings herein indicated." (Emphasis supplied.)

Summarizing, if the action of the district court of three judges was that of a specially constituted three-judge court under Section 266 of the Judicial Code, it was without authority to dismiss the Motion for Damages if such specially constituted courts **must remit** to the single judge the ancillary matter; and, if it was the action of an ordinarily constituted one-judge court, it acted in conflict with the uniform rule in all circuits permitting the court, in its discretion, to render judg-

ment for damages on the injunction bond in the main equity proceeding, **and favoring such action except in rare cases.**

It is believed that there is no reported case showing a dismissal of a defense pleading for *affirmative relief*, and surely no case of record where several state officers and state departments are relegated to a burdensome number of separate actions at law in many different forums in different states to collect or seek restitution of statutory license fees which the seventy-six (76) plaintiffs were obligated to deposit with the trustee under the terms of the temporary restraining order, and which restraining order plaintiffs violated for fifteen months and thereby breached the express conditions of their injunction bonds.

(6) In **Camp v. Boyd,** 229 U. S. 530, l. c. 551-552, the Court said:

> "A court of equity ought to do justice completely, and not by halves. (Citing cases.)
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority."

(7) Moreover, this Court, in **Pease v. Rathbun-Jones Engineering Company**, 243 U. S. 273, l. c. 279, said:

> "The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, *will completely dispose of its incidents and put an end to further litigation.* Applying this principle equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds." (Emphasis supplied.)

The specially constituted three-judge court in the Eichholz case, supra, applied the above rule of the Pease case.

D. Equity will do complete justice.

There is another line of cases which hold that a court of equity, even specially constituted three-judge courts, will retain jurisdiction to do complete justice.

(1) In **Sterling v. Constantin,** 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383, this Court said.

> "The jurisdiction of the District Court so constituted (three judges), and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; Davis v. Wallace, 257 U. S. 478, 482, 66 L. ed. 325, 328, 42 S. Ct. 164; W. T. Waggoner Estate v. Wichita County, 273 U. S. 113, 116, 71 L. ed. 566, 568, 47 S. Ct. 271."

(2) In **Railroad Commission of the State of California v. Pacific Gas & Electric Company,** 302 U. S. 388, 391, 82 L. ed. 319, 321, the Court said, in another Section 266 case:

> "Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 S. Ct. 48; United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307, 73 L. ed. 390, 395, 49 S. Ct. 150."

(3) Also see **Sovereign Camp, W. O. W. v. Murphy,** 17 Fed. Supp. 651, where a three-judge court in the Eighth Circuit, acting under Section 266, followed the above principle and cited the above cases.

In three cases involving **counterclaims** this Court has said that equity courts will do complete justice:

(4) **Leman v. Krentler-Arnold Hinge Last Company,** 284 U. S. 448, 451, 76 L. ed. 389, 393;

(5) **Young Company v. McNeal-Edwards Company,** 283 U. S. 398, 400, 75 L. ed. 1140, 1141-1142;

(6) **Chicago & Northwestern Railway Company v. Lindell,** 281 U. S. 14, 17, 74 L. ed. 670, 672.

In the last cited case, the Court said:

"The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the court's time and injustice. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615, 616, 38 L. ed. 565, 571, 572, 14 Sup. Ct. Rep. 710; Florida R. Co. v. Smith, 21 Wall. 255, 261, 22 L. ed. 513, 514; Partridge v. Phoenix Mut. L. Ins. Co., 15 Wall. 573, 579, 21 L. ed. 229, 230. In the case last mentioned, the court, speaking through Mr. Justice Miller, said (p. 580):

> '*It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same form*'." (Italics supplied.).

E. Abuse of judicial discretion to disallow expenses of defense (R. 95).

In its opinion the Court has stated (R. 100):

"The motion was limited by its terms to the fees and taxes claimed to have accrued against the numerous truckers . . . . . ."

The motion (R. 79) is not limited by its terms to the "fees and taxes" claimed to have accrued against the numerous truckers. The motion includes the words "damages" and "costs", which are used in accordance with the proper and broader meaning of each. Surely, as intended by the new liberal rules of civil procedure, this Court will accord to the pleading in question,

if it contains substantial language, such reasonable meaning as the drafters of the pleading contend for it (R. 84, 85; 124, 129 original). It is obvious that it would have been a clear oversight of substantial rights of defendants if their counsel had prepared a motion for damages in an equity matter without including therein a request for recovery in damages of substantial expenses incurred in their respective defenses. The word "damages" is one of broad meaning. The word "costs", obviously, did not mean court costs.

III.

A. Was it not the Duty of the Specially Constituted three-judge District Court, upon consideration of the fact that it found the issues on the injunction matter in favor of the defendants, to remand the Motion For Damages to the single judge, who granted the temporary restraining order and fixed its terms and conditions, for proceedings to be taken thereon independently of the provisions of Section 266 of the Judicial Code?

Argument of this question has been adequately presented in the Summary of the Argument. The following suggestions and explanations, however, seem appropriate.

If the Supreme Court should decide that any of defendants below are the right parties to maintain the Motion For Damages and that, having such right of action, it would be an abuse of judicial discretion to relegate them to seventy-six (76) separate causes of action in many different forums in various states, then it is unimportant to petitioners whether the Supreme Court shall remand the Motion For Damages to the District Court to be tried on the merits before the single judge who issued the temporary restraining order or before the specially constituted three-judge District Court itself. Petitioners would have their day in Court in either event.

In two cases taken to the Supreme Court recently in which the Public Service Commission was a party, namely,

1. Public Service Commission v. Brashear, 306 U. S. 204.
2. Columbia Terminals, v. Lambert, et al., 309 U. S. 620. Public Service Commission, v. Columbia Terminals, 309 U. S. 620.

in each of which the main cause of action was under the provisions of Section 266 of the Judicial Code, it appears certain the the Supreme Court will not allow a *direct appeal* from an adverse ruling on a counterclaim, motion for damages, or other ancillary type of action, regardless of whether or not there is prosecuted a *direct appeal* from an adverse ruling on the three-judge injunction matter.

In the aforesaid Brashear case there was no appeal taken by plaintiffs at the end of the appeal period from the adverse action of the Court on the three-judge injunction matter. Appellants, however, including the Public Service Commission of the State of Missouri, prosecuted a *direct appeal* to the Supreme Court, believing that, notwithstanding, an appeal on the adverse ruling on the counterclaim would also go *direct* to the Supreme Court. But the Court *dismissed outright* the appeal on the counterclaim. (The present proceeding therefore constitutes the second effort of these petitioners to have their day in court on a part of the subject matter included in the Motion For Damages herein discussed.)

In the aforesaid Columbia Terminals case, plaintiff Columbia Terminal prosecuted a *direct appeal* to the Supreme Court from an adverse ruling by the three-judge Court on the injunction matter, as also did defendants Public Service Commission, and others, from an adverse ruling on their counterclaim for statutory license fees like those now under consideration. Although both appeals were based upon the same record, *the same opinion, the same decree*, and were prosecuted from adverse judgments therein of the same specially constituted, statutory three-judge District Court, acting under the provisions of Section 266 of the Judicial Code, nevertheless, the Supreme Court affirmed a motion to dismiss the direct appeal on the counterclaim, *and dismissed it outright.*

In both the Brashear and Columbia Terminals cases counsel for defendants below, who were appealing from adverse rulings of specially constituted three-judge courts on counterclaims set up in the answer to the main injunction petition, believed that the appeal would lie in the Supreme Court. It seemed *then* that, under the circumstances of joint handling of the injunctions and counterclaims by the same three judges in each respective case, and on the same com-

mingled record in each case, an appeal on an adverse ruling on such a counterclaim, or other ancillary matter, to the Circuit Court of Appeals would be illogical. Moreover, it seemed *then* that it would be impractical and burdensome to prepare two records for appeal, namely, one record on a direct appeal to the Supreme Court from an adverse ruling on the injunction matter and one record to the Circuit Court of Appeals from an adverse ruling on a counterclaim.

To avoid confusion the Supreme Court should adopt a clear rule for appeals in such ancillary matters. Perhaps the confusion commences when specially constituted three-judge statutory courts, together with Counsel, inadvertently assume that jurisdiction of such counterclaims or ancillary causes of action, as in the recent Eichholz, Brashear and Columbia Terminals cases, belongs to them. Perhaps the Supreme Court will adopt the rule that such ancillary matters, if they are to go to trial on the merits, should be remanded by the specially constituted three-judge statutory court to the single district judge who granted the temporary restraining order and fixed its terms and conditions for proceedings thereon to be taken independently of the provisions of Section 266 of the Judicial Code. If such a rule is fixed, the question of where an appeal from an adverse ruling thereon shall lie will be clear.

Such a rule was suggested by the opinion of the Circuit Court of Appeals now under review. But the Circuit Court although it suggested that which may be a good rule, did not accord appellants (petitioners here) the advantage of it. It is believed that its failure in that respect constitutes reversible error.

The Court dismissed outright the aforesaid Brashear and Columbia Terminals Company improvidently prosecuted direct appeals by Public Service Commission of the State of Missouri. It did not give relief as suggested, and as was accorded, in **Oklahoma Gas and Electric Company v. Oklahoma Packing Company,** 292 U. S. 306, whereby appellant was saved from an improvidently prosecuted direct appeal to the Supreme Court. See also, **William Jameson & Co. v. Morgenthau,** 307 U. S. 171, also **Rorick v. Board of Commissioners of Everglades Drainage District,** 307 U. S. 208, and **Wilentz v. Sovereign Camp, W. O. W.,** 306 U. S. 573.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed, and the cause be remanded to the District Court with directions to proceed to trial on the Motion For Damages.

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January, 1941.

APPENDIX

Section 5272, Laws of Missouri, 1931, pp. 311-312, inclusive.

§ 5272. Annual license fee—allocation—penalty

(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; *provided, however,* that no motor vehicle coming within the provisions of this act shall be used or licensed which has a greater dimension or weight than is now or may hereafter be provided by law. In all cases where the mileage of any route covered by any certificate of convenience and necessity and/or an interstate permit issued under the provisions of this act shall be in question, the public service commission shall by order determine such question and the order of the public service commission in such cases shall be final. For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the public service commission as conclusive evidence. *Provided,* that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third or the license fee hereinafter set out. *Provided further,* that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the

license fee shall be one-half of the license fee hereinafter set out. In case of emergency or usual temporary demand for transportation, the license fee or additional motor vehicle for limited periods shall be fixed by the commission in such reasonable amount as may be prescribed by general or temporary order. The commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; and the commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicle in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates.

(b) For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a passenger carrying vehicle, the sum of ten dollars per passenger seat.

(c) In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the public service commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a freight carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons	$ 25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00

More than 7 and not more than 8 tons..... 275.00
More than 8 and not more than 9 tons..... 350.00
More than 9 tons..... 500.00

(d).....
(e).....
(f).....

Rules of Public Service Commission (R 90).

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